U.S. Department of Labor

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Mailed 10/11/00

IN THE MATTER OF:	
Joseph D. Nelson Claimant	BRB No.: 97-1618
Against	Case No.: 1996-LHC-0285
Zapata Haynie Corporation Employer	OWCP No.: 6-153265
And	
Hartford Accident & Indemnity Carrier	

APPEARANCES:

Tommy Dulin, Esq.
For the Claimant

Richard W. Withers, Esq.
Coynelle C. Berry, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER ON REMAND - AWARDING MEDICAL BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing on remand was held on March 22, 2000 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, JX for a Joint Exhibit and RX for an exhibit offered by the Employer/Carrier (“Respondents”). This decision is being rendered after having

given full consideration to the entire record and the Board's instructions on remand.

PROCEDURAL HISTORY

This Administrative Law Judge, by **Decision and Order Awarding Benefits,** dated May 2, 1997, concluded that Joseph D. Nelson ("Claimant") had been injured on October 31, 1988 in the course of his maritime employment while working for Zapata Haynie Corporation ("Employer"), that such injury had resulted in periods of temporary total and permanent total disability, that he reached maximum medical improvement on March 26, 1992 and that he was entitled to ongoing benefits from that date for his permanent total disability. Claimant was awarded certain medical benefits, as was discussed at length in the decision, and the Respondents were found entitled to the limiting provisions of Section 8(f) in view of Claimant's multiple medical problems.

Respondents timely appealed from said decision and the Benefits Review Board, by **Decision and Order** issued on August 19, 1998 affirmed the award of permanent total disability, as well as the award of Section 8(f) relief and approval of the attorney fee of Mr. Dulin. However, with reference to the award of "certain specific medical treatments and expenses," the Board vacated the "award to Claimant of ongoing psychiatric counseling with Dr. (Else) Tracy" and "remand(ed) the case to this Administrative Law Judge for reconsideration of the evidence regarding this treatment." **Nelson, Sl. Op.** at 3.

With reference to the award of benefits "for the cost of domestic services three times a week," the Board reversed that award and did not remand that issue to this Administrative Law Judge.

With reference to the award of "a stair climber and a treadmill," the Board also reversed that award and did not remand the issue. Likewise, with reference to the award of a "handicapped vehicle" to enable Claimant to get around with personal dignity, the Board vacated that award because, according to the Board, "we are unable to ascertain with certainty exactly what the Administrative Law Judge has awarded to Claimant" (**Nelson, Sl. Op.** at 6), apparently because I "interchangeably refer(red) to a 'suitable van,'" a 'handicap accessible van,' a 'suitable vehicle' or a 'handicapped vehicle,'" and the Board has remanded that issue for reconsideration of all of the relevant evidence. (**Nelson, Sl. Op.** at 6)

Claimant timely filed for reconsideration with the Board and the Board denied the petition by **ORDER** issued on June 2, 1999.

The parties were given an extensive amount of time to resolve this matter voluntarily so that Claimant could return, as best as possible, to the **status quo ante** he enjoyed on October 30, 1988 and to enable him to go on with his life with some semblance of personal dignity, all of which he has been denied as a result of his work-related injury and the Carrier's initial reluctance and then delay in authorizing the psychiatric counselling that he needs so badly. Had the Carrier not dragged its feet herein and had it met Claimant half-way, in a spirit of cooperation and compromise, these issues would have been resolved long ago. However, such did not happen and a remand hearing was held on March 22, 2000, at which Claimant, his wife and Dr. Else Tracy testified on Claimant's behalf. Ms. Heather Ann Laidlow, the Carrier's adjuster, and Dr. Henry A. Maggio testified on behalf of the Respondents. The official hearing transcript, totaling 203 pages, was filed on April 10, 2000.

The Findings of Fact and Conclusions of Law made in my May 2, 1997 **Decision and Order Awarding Benefits,** to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference and as if stated **in extenso** and will be reiterated herein only for purposes of clarity and to deal with the Board's mandate.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 11	Attorney Dulin's letter suggesting a briefing schedule	05/04/00
CX 12	Attorney Dulin's letters confirming The briefing schedule	05/19/00
CX 13	Attorney Dulin's letter modifying the briefing schedule	06/23/00
CX 14	Attorney Dulin's letter filing	07/03/00
CX 15	Claimant's brief	07/03/00
RX C	Respondents' brief	07/06/00

The record was closed on July 6, 2000 as no further documents were filed.

Summary of the Evidence

Dr. Else Tracy, Claimant's treating psychiatrist since February 10, 1992, states as follows in her January 25, 2000 progress notes (CX 1 at 1-2)

1/25/00 Initial interview 9080. Psychiatric Evaluation

Name: Joseph Nelson.

Identifying Data: 46 y/o white male, married with 3 children. Disabled workman. On Workman's Comp. Referral Source and Reliability: Referred back by his attorney. Permission from workman's comp.
Chief Complaint: Pain.

Present Illness: See old records. Has had a case with workman's since 1996. Has continued to have transportation problems - has now a chauffeur sent from Leaksville to take him to Dr's visits. Still under care of Dr. Dempsy, q 2-4 mos.
Still having chronic pain. Goes up and down. Very angry. If (he) had the means to do harm to those he feels persecute him, he would. Let him go to Pro Health in Mobile - water therapy 3 x per week. Past psychiatric History: See prior chart.

Past Medical History: Still has diabetes mellitus. Insulin Dependent. Blood sugars running high since he had the flu. Cared for by Dr. Dempsey, Dr. Kristin Vergunst, and Dr. Allgood. Dr. Semples, ophthalmologist. Has developed carpal tunnel syndrome bilaterally - wearing braces on arms for past 2 yrs.
Family Medical History:

Social and Developmental History: See old chart. Wife has to bathe him. He can wash his upper body. Still having problems with various appliances so can function more independently. Children are not giving him any problems.
Current Medications: See accompanying list. Having BP problems, it dropped to 72/52. Taken off his Demedex. Went up to 100/60.

Allergies: Morphine - rash. Talwin-psychosis, Talinase - psychosis.

Substance Abuse History: Denies smoking, street drugs, or alcohol

Mental Status:

Appearance: Obese middle aged male. Dressed in blue shirt and jeans and wearing a baseball cap. Clean and neat
Orientation, Alert, and oriented
Manner of Relating: Rapport is excellent. Tells me I taught him so much that can use.
Thought Pattern and Content
Mood and Affect

Intellectual Functioning

Impression and Plan
Meds
Labs
Records
Therapy: Need to deal with the anger. Wants to live long enough to enjoy life. To survive despite workman's comp. (Whom he believes wants him to die.) Set some goals.

Having BP probs with hypotension. Taken off Demedex temporarily. Functioning history obtained. Can get out and walk around some - does most days. Goes to tx. 3x per wk. Feels trapped at home as can not get around - can't go visiting or to funeral. Needs assistance in dressing and bathing. Toileting - he can do. Gets up 3:30 - leaves to go to pro health by 4 and back by 7 three days per week. Walks in his yard on nice days. Watches some tv, until uncomfortable in chair, and will lie down and meditate, which relieves pain without "popping pills." Plays with grandchild. Has sensory deficit in legs from hips down. Legs can not distinguish between hot and cold. Pain in back in thoracic area, and in shoulders. Neck feels stiff and headache at times. Elbows throb. Numbness in 5th and 4th digits of L. hand,

Mood - stays in a pretty good mood until things occur to frustrate him. Themes are of social isolation. Frustration and anger are a problem.

Will see him for now on a monthly basis.

DIAGNOSIS

Axis 1: 309.0 Adjustment disorder with depressed mood

At the hearing the parties announced that they had reached the following interim arrangement, **i.e.,** one to last for eighteen months, wherein the parties hereby stipulate as follows (JX 1):

1. The Employee/Claimant shall be entitled to receive appropriate psychiatric care from Else Tracy, M.D. for a period of
up to 18 months from December 22, 1999, without order of the Administrative Law Judge assigned to hear this claim for the Department of Labor. The right to receive such care shall continue
during such time so long as the Employer/Carrier is reasonably satisfied that the care being rendered is medically necessary, appropriate, and is concerned with conditions causally related to

or exacerbated by the Employee/Claimant's back injury.

2. Employer/Carrier has agreed to provide home modifications to the Employee/Claimant in the form of a widening of the front door entrance to the Employee/Claimant's house and a modification to the Employee/Claimant's bathroom to install handles or railing in the shower facilities.

3. The attorney for the Employee/Claimant has agreed to accept the sum of $9,000.00 in full satisfaction of his right or claim to attorneys' fees and costs pursuant to the award by the Benefits Review Board's order of May 25, 1999.

As noted, the issues for adjudication included (1) reasonableness and necessity of a suitable handicap equipped van to be purchased by the Employer and Carrier for the use and benefit of the Claimant; (2) authorization of psychiatric services of Dr. Else Tracy; (3) reasonableness and necessity of suitable handicap modifications to the Claimant's residence to be furnished by the Employer and Carrier; and (4) associated issues, including assessment of reasonable attorney fee award against the Employer and Carrier in favor of the Claimant’s attorney.

Dr. Tracy, called by the Claimant to testify as an expert in the field of psychiatry, testified about her psychiatric practice, and her treatment of Claimant beginning February 10, 1992. She testified that Claimant was referred to her jointly by Dr. Dempsey, orthopedic surgeon, and Mr. Tingle, a vocational rehabilitation specialist. Her treatment of Mr. Nelson was intended to assist him with the effects of surgeries as well as chronic pain. She acknowledged that the Carrier deauthorized her treatment of Claimant despite his obvious need for further psychiatric services. (TR 113-116)

Dr. Tracy outlined her detailed psychiatric diagnosis of Mr. Nelson - Chronic Pain Syndrome and Adjustment Disorder of Adult Life with Disturbance of Mood. She testified about the harmful effects on Claimant’s mental state caused by the Carrier's deauthorization of her supportive psychiatric services. She opined that Claimant's psychiatric conditions are causally related to his accident and injuries sustained at Zapata. (TR 116-118)

Dr. Tracy further testified about her success in reducing Claimant’s need for strong pain medications as well as his ongoing need for her continuing psychiatric services. (TR 118)

Dr. Tracy offered detailed and very specific opinions regarding the medical necessity for a suitable handicap vehicle

to be purchased by the Carrier for Claimant. She testified that the handicap vehicle would enhance Claimant's senses of control of his life, autonomy, and independence, and would decrease his hostility, tension, depression and anger. (TR 118-119)

Dr. Tracy related the adverse effects upon Claimant caused by the poor system of transportation provided by the Carrier, including van rental, as well as Access/CBI. She testified that Claimant was frustrated by this awkward, expensive, transportation arrangement, and "...he has thought of killing himself because of this." (TR 120) Dr. Tracy stated that she knew of no reason, from a medical stand point, why Claimant could not operate a properly equipped handicap vehicle. (**Id.**)

Dr. Tracy explained the medical necessity for suitable modifications to Claimant's home. (TR 121-122)

Dr. Tracy discussed the narrative report of Dr. Maggio, and noted that both she and Dr. Maggio had reached essentially identical diagnoses of Claimant's psychiatric conditions. Despite Dr. Maggio's conclusions, Dr. Tracy opined that a handicap vehicle and residence modifications were reasonable and necessary from a medical standpoint. (TR 122-125)

Dr. Tracy was cross-examined and testified that she believed that Claimant could safely operate a suitably equipped handicap vehicle. (TR 125-127) Dr. Tracy explained why Claimant cannot utilize a standard vehicle and requires a handicap equipped vehicle. (TR 131-132). She stated, "Listen, a car is freedom." (TR. 133) She equated purchase of a handicap vehicle for Claimant with purchase of crutches for him. (TR 134)

Dr. Tracy was reexamined on direct, and testified that purchase of a suitable equipped handicap vehicle would improve Claimant's mental health and that lack of such a suitable vehicle was harmful to his mental health. (TR 136)

The Employer/Carrier called Ms. Laidlaw to testify in support of the defense of the case. Ms. Laidlaw, a claims consultant for the Carrier, has handled Claimant's claim since 1995. (TR 145)

Ms. Laidlaw testified that the Carrier had changed from providing for Claimant a "van rental to Access/CBI, ... so that we could better monitor the needs." (TR 146) She also testified that the Carrier had agreed to widen Claimant's front door, place a ramp at the front door and install rails in the bathroom. (TR 147)

Ms. Laidlaw also discussed the topic of suitable vehicles for Claimant's transportation (TR 148-150) and, in response to intense cross-examination, Ms. Laidlaw admitted that she did not know how much the Carrier had spent on rental vans and limo services since Claimant's accident in 1988. She could not, however, deny that the amount spent was in excess of $75,000.00. (TR 150-151)

Ms. Laidlaw admitted that the limo services of Access/CBI were solely for medical appointments pre-approved by the Carrier and that the Carrier had purchased handicap equipped vehicles for other Claimants. (TR 151-152)

Ms. Laidlaw offered her opinion that Claimant's injury is orthopedic; thus, since his orthopedic surgeon had not insisted upon a handicap vehicle for Claimant, the Carrier would not purchase such a vehicle. She offered this testimony despite Dr. Tracy's testimony of injury related psychiatric condition and Dr. Tracy's opinion regarding reasonableness and necessity of a suitable handicap equipped vehicle. (TR 152-154) Noteworthy is the fact that Ms. Laidlaw contradicted her direct testimony regarding the reasons for the Carrier's change from rental van to limo services when she admitted that the Carrier decided to refuse to pay for liability insurance on rental vans, an act which precipitated the change to limo service. (TR 154)

Ms. Laidlaw admitted that the Carrier had failed, for a period of approximately three (3) years, to follow the Decision and Order requiring suitable handicap modification of Claimant's home. (TR 154-155; 158) However, the Carrier took this position because no physician had ordered modifications of Claimant's bathroom other than a recommendation related to the need for installing hand rails, despite Dr. Tracy's testimony. (TR 155-157)

Ms. Laidlaw admitted that she had not performed any investigation into suitable handicap vehicles, and she was unable to give specific testimony thereon other than that the Carrier has consistently refused to purchase one for the Claimant.

Dr. Henry Maggio was called to testify by the Employer/Carrier. His **curriculum vitae** was introduced as RX-A. He testified that he had evaluated Claimant and diagnosed Chronic Pain Syndrome, Adjustment Disorder with Depressed Mood, Three Back Surgeries, diabetes mellitus, hypertension and exogenous obesity. Dr. Maggio testified to Dr. Tracy's treatment of Claimant, and conceded her success in treatment. Dr. Maggio described numerous complicating factors in Claimant's course of treatment, including leg give away, limited mobilization,

transportation difficulties, diabetes, and feelings of imprisonment. (TR 162-169)

Dr. Maggio stated, "Claimant was extremely candid, honest, and cooperative in his evaluation...." He noted similar honesty in Ms. Nelson and he explained his interpretations of Dr. Tracy's course of treatment. (TR 168-170)

Dr. Maggio explained his opinion that a Lincoln Navigator or other handicap vehicle is not a medical necessity for Claimant. Dr. Maggio stated, "It's not lifesaving, and it's not going to change his condition." (TR 171-172)

Upon cross-examination, however, Dr. Maggio admitted that he had seen Claimant only once, and that Claimant was never his patient. He admitted that he had never evaluated a Longshore Act Claimant at the request of a Claimant's attorney; rather, all Longshore evaluations he has performed were at Employer and Carrier's request. Dr. Maggio admitted that nothing will cure Claimant - neither crutches nor orthopedic shoes nor a handicap vehicle. He admitted that from a psychiatric view point, the purchase of a suitable handicap vehicle would not harm Claimant. Indeed, he admitted that the handicap equipped vehicle, "...would be helpful." (TR 183-186)

Dr. Maggio acknowledged a long standing knowledge of Dr. Tracy, whom he described as his class mate in medical school, and stated, "Else's a good doctor." (TR 187)

Dr. Maggio admitted that he knew of no physician who had restricted Claimant from operating a motor vehicle, and he admitted that he did not know that Claimant possessed a valid Mississippi driver's license. Likewise, Dr. Maggio admitted that he did not know the applicable state law concerning operation of a properly equipped handicap vehicle and that Claimant is not a malingerer. (TR 187-189)

Dr. Maggio reviewed CX-10 (photographs of various scenes of Claimant's residence) and testified regarding the reasonableness and necessity for modifications of his home, including properly equipped handicap shower, commode, and ramp. (TR 190-192)

Dr. Maggio further testified that he knew that Claimant was fully capable of, and, in fact, did regularly operate a motor vehicle before his work related accident of 1988. (TR 196-197)

The following exhibits were offered by the parties as part of the remand proceeding:

CX 1 are the medical records of Claimant's treating psychiatrist, Dr. Else Tracy. Most noteworthy is the doctor's

report of the visit of January 25, 2000, wherein the doctor notes that he still has chronic pain; is very angry; and insulin dependent. She notes that he believes that the Carrier wishes he would die.

Dr. Tracy's office notes of Claimant's visit of February 8, 2000 reflect that he feels trapped at home and needs assistance dressing and bathing. She notes themes of social isolation as well as frustration and anger on his part.

CX 2 is Dr. Dempsey's medical record of November 15, 1999, reflecting the need for a replacement lift chair for Claimant.

CX 3 is Dr. Vergunst's prescription of January 17, 2000, for laboratory work for Claimant.

CX 4 are e-mails between the attorneys wherein Claimant's counsel advises Employer/Carrier's counsel that the Carrier has declined to provide liability insurance coverage for rental vans and discussions concerning purchase of a handicap equipped vehicle for the Claimant.

CX 7 is former defense attorney Crawley's letter to Claimant's attorney regarding purchase of a handicap vehicle.

CX 8 includes letters from Claimant's counsel to counsel opposite concerning handicap vehicle; authorization of Dr. Tracy; transportation by Access/CBI; replacement lift chair, and home modification as well as three (3) letters to this Court from Claimant's counsel.

CX 9 includes a cost estimate for handicap vehicle, tag, title, insurance, and necessary handicap equipment for a suitable handicap vehicle to be purchased by the Carrier for Claimant.

CX 10 includes photographs depicting Claimant's home and lift chair.

JX l is the joint stipulation of the parties, wherein the parties enter into stipulations concerning an interim authorization of Dr. Tracy; modifications to Claimant's home; and Attorney Dulin's acceptance of past due attorney fee. Claimant's counsel clarified these stipulations at pages 12-13 of the trial transcript and Employer/Carrier's counsel concurred.

JX 2 is a list of medications of the Claimant.

RX A is Dr. Maggio's **curriculum vitae.**

RX B is Dr. Maggio’s narrative report.

Dr. Henry A. Maggio, Board-Certified in Psychiatry and Neurology, and a medical class mate of Dr. Tracy, has expressed his opinions in his March 20, 2000 **Summary Report**, a report in evidence as RX B, wherein the doctor states as follows:

“This is a Summary Report on Joseph Nelson, 45 year old, white male who was seen for an evaluation on 3-13-2000. This evaluation was done at the request of Mr. Richard Withers, Attorney At Law, Jacksonville, Florida for The Hartford Insurance Company who is the Carrier in this case. This involves a long-term case of back pain, surgery, diabetes'complications and also a loss of mobility because of back and leg problems. Claimant has had surgery performed by two different neurosurgeons and also has been followed by Dr. Else Tracy on a monthly basis and I think he had stopped seeing her for a period of time and recently returned for two visits which give a diagnosis of Adjustment Disorder with Depressed Mood (309.00). There's a series of questions posed to this examiner which will be addressed at the end of the evaluation.

“Mr. Joseph Nelson came to the office on 3-13-2000 having been transferred to the office by a limousine service provided by the insurance company. He is accompanied by his wife. They were 30 minutes late for their appointment but I had been notified that that would happen as he had to come quite a distance from Lucedale to Gulfport. Claimant is noted to be a rather large and obese male who has difficulty walking and has two crutches for each hand that also go up the arm for support. He came into the office and was made comfortable and his wife also was waiting in the waiting room. I returned a call to the limousine service notifying them that they had, in fact, made their appointment on time.

“Mr. Nelson was invited into office where he was noted to ambulate slowly, leaning heavily on his crutches and he was invited to sit in a high back, leather chair that was supportive. He questioned why his wife couldn't come into the evaluation and then I informed him gently that this was his evaluation but I would make time available for her to come in to corroborate information and also to ask questions and he was comfortable with that. I explained to Claimant the reason that he was being seen for evaluation as I was a psychiatrist and he had been under the treatment of another psychiatrist and the company was desirous of a second opinion and he understood.

“I asked Claimant to give me a history of what happened to him and he said he had been hurt quite a long time ago, October 31, 1988, in which he was working for a fishing net mender, Zapata Haynie, and he was unloading a truck. He apparently fell

backwards and he was straddling a bar and said he was hurting in his low back, in his scrotum, and in his rear end. There was a throbbing that went into both legs. He describes being on the cart about 5 feet off the ground and was eased to the ground standing up and felt like he was unable to stand. He was helped into the building and was laid on some boxes of netting. He said he was yelling in pain when he slid off the cart unto the ground. He was asked by a personnel manager if he needed to go to the hospital. He tells me he wanted the paramedics to actually come. He said he was sent to the hospital in a Chevy Malibu and was in a lot of pain riding and was crying by the time he got to Singing River Hospital in Pascagoula. He was then placed on a gurney and hurting an awful lot and said they wanted a urinalysis before they would do anything for him. He was unsure why they wanted a urinalysis and I explained to him that anytime anybody has a straddle injury they would have to worry about bleeding in the bladder or urinary tract and so were testing for blood, etc.

"Subsequently, he underwent three surgeries. In December of 1988 he had the first surgery by Dr. Privel for contusions all the way up his back. The second operation was in 1989, again with Dr. Privel and said there were also two other surgeries for infection in his legs. The first surgery seemed to help. After the first surgery he was having more pain and they had to do a second surgery to correct the left side and the right side which had collapsed. They had him in a body cast and a brace with velcro straps and he did well and was exercising and walking. They then sent him to a back clinic and put him in a machine which was like a chair with straps on his legs and they were going to measure his mobility. He reports it sounded like his back was tearing and they sent him to Ocean Springs Hospital for a myelogram. He went to Dr. Privel's office and said the doctor was upset. He said it looked like he would need more surgery with a fusion but he was going to refer him to another physician, a Dr. Dempsey in Mobile.

"Dr. Dempsey performed the third surgery in March of 1991 and had to do more than he anticipated using Harrington rods and screws, a bone simulator at L5/S1 for the fusion because he had to use an anterior and posterior approach and the vertebrae were unstable and needed stabilization until they were solid and that's the reason the bone simulator was used. It is Claimant's understanding that the bone simulator would be left in approximately 2 years but as he said, it's still there and he has asked if it could be removed. He relates the first time he asked about removal, the Workmen's Compensation wouldn't pay to have it done. The last time he asked was a few weeks ago and Dr. Dempsey told the nurse to set it up for April as an outpatient procedure. Claimant does have questions about all of this and

doesn't want to sound paranoid and said his wife helps him go over all these things.

“He related he has not been back to work since the original injury except for a short period after surgery #1. The doctors that he sees are Dr. Dempsey who is his main, Orthopedic Doctor and he sees him every 3-4 months for follow-up and medications; second physician is Dr. Vergunst who is an Internist and treats his severe diabetes and his hyperlipidemia and his hypertension with multiple medications (a list of which will be attached). Claimant states that after surgery #2, Dr. Privel told his wife that his sugar had gone up over 600 and it needed to be brought down and Dr. Allgood came in to treat that and then afterward, he started seeing Dr. Vergunst. His third doctor is Dr. Tracy who apparently started seeing him in 1992 and saw him for awhile for 3 or 4 years and then according to Claimant, Workmen’s Comp stopped that. They apparently rescheduled it and she's had two visits so far this year. Apparently the last two visits were 1-25-00 and 2-8-00 and were new follow-up visits in which Dr. Tracy is treating him with talking treatment to help him deal with his anger and to set some goals. The diagnosis is listed as (309.0) Adjustment Disorder with Depressed Mood.

“I asked Claimant to tell me his current complaints following his accident. He starts off by saying that after he was hurt and he couldn't work, he had periods where he would faint and then after surgery #2, it was more of the same with a buildup and he was unable to work, periods of fainting, not able to do things for his children. His daughter was 3 and he couldn't play with her. He would pick her up before he got hurt and then after he couldn't do that. He could take his boys, who at that time were 7 and 12, fishing but be couldn't do that anymore. He couldn't garden anymore and this was a family affair, gardening and fishing, etc., they did everything together even shopping. All went away when he got hurt. He had two surgeries and wasn't any better and started hurting so much and after the third surgery (in which he thought his problems would be over, i.e., he would go back to work and provide for his family and do things with his family again and get the biggest part of his life back, i.e., be active with his children) but he really couldn't participate in much. He said the day he went back to Dr. Privel and the nurse bad heard his back was ripped after surgery #2, he reports Dr. Privel asked him what kind of vehicle he owned ... a Ford Granada. He said he was told he needed a higher seated vehicle which would decrease the strain on his lumbar area and Dr. Privel wrote a prescription for a different type of transportation. He said he turned it in and it caused a lot of problems and this was before Mr. Dulin was his attorney.

“After surgery #3, Dr. Dempsey said he needed a handicap vehicle, that he wouldn't be able to work anymore and he was permanently disabled and his legs haven't worked right and he tends to collapse without any warning. After surgery #3 he was sent home in an ambulance and they started renting vans for him to go to doctors, etc. He reports they told his wife to rent the van, put it on a credit card and they would be reimbursed. He states Dr. Demsey wrote a prescription for a handicap vehicle and he turned it in and since his legs don't work, they needed hand controls. He said again, this caused trouble and when he did go to his deposition of Dr. Dempsey (he sat in and they rented a vehicle to take him there) Dr. Dempsey said in essence, it is not medically necessary and it wouldn't heal him or make him any better. Claimant said crutches don't make me any better but they do help by giving assistance as do the back braces and the shoes that are prescribed and paid for by Workmen's Compensation. So, they pay for some things and others they don't. He said they paid for the van rental up until the past year and said they weren't paying for insurance and he didn't want to go in a vehicle that was not insured. They now say he has use of access transportation and they have been utilizing it. He goes to Pro Health Therapy three-times-a-week in which he gets up at 3:00 a.m. and leaves at 5:00 a.m. He said he doesn't answer the phone at home and the Workmens's Comp got upset because they now have to notify them when he gets finished with therapy so they can return him home. It's a complicated process.

“When asked to describe a typical day: Claimant said he usually gets up from 6:30 to 7:00 a.m. and has to have help to bathe (because there's no facilities for a handicapped person, he hasn't dressed himself in years, his equilibrium is off and be doesn't have hand railings and he has no balance) and they usually bathe in the morning as a rule. He ambulates around the house with his crutches and also uses a walker every now and then. His appetite varies and he's on a 2400 calorie diet in which he eats broiled meats, no salt, lots of fruit and vegetables. He goes into great detail about what he actually does eat. Prior to eating breakfast, his wife checks his blood sugar, then after he walks in the yard, and they have an A-frame swing; sometimes he sits inside while his wife is busy with the house and the daughter. He will then putter in the yard, watches his neighbor train horses, talks with his neighbor and he has a 2 year old granddaughter who comes over and he spends time with her. He goes to bed by 8:00 or 9:00 p.m. or so and said he has initial insomnia and his legs feel like there are pins and needles from his buttocks down his legs and sometimes even a sensation of formications. His pain is described as intermittent and he said Dr. Dempsey had initially referred him to Dr. Tracy because he had problems with prescription drugs in which he was abusing them and he didn't realize this. Dr. Dempsey sent him initially to Dr. Penton, Ph.D., Psychologist, which was a waste

of time and then he went to Dr. Tracy who worked with him, educating him with tapes, behavior modification and he still takes some pain medicine intermittently. Currently, as he sees Dr. Tracy the past two visits, apparently he's not taking any medication at all and is doing just talking, supportive therapy.

"Past history reveals he was born in Jackson County. His mother died of lung cancer at age 60 and his father died of bone cancer at age 73. The siblings consist of two sisters, one brother and he is the third. He said he went to school until the 6th grade and quit because of integration fights, etc., at that time. He worked in a feed store in Moss Point for several years doing manual labor unloading and carrying feed out. Then he obtained a driver's license and was able to deliver and also worked the cash register at Miller's Store...He states he has always been in good health and he's been married for 24 years and they have three children. The oldest son is 23; the second son 18 and a daughter 14. His history is positive in that he had a T & A at age 18 and he reports being allergic to Morphine, Talwin, Tolinase and Cortisone. He denies smoking or alcohol but gives a history of having diabetes mellitus and hypertension. Dr. Tracy helped him with medicines and depression. She counseled him about suicide which had crossed his mind and the thought was use the gun but he hasn't and wouldn't do that because of his family stating he did have a gun in his mouth when he thought about his family. Dr. Tracy also counseled him about suicide because of people who act so uppity and call him illiterate. They also cause aggravation to his wife and she has to go through all the stuff and do all the things all these years that she's had to put up with such as rental of vans. These would be targeted at Workmen's Compensation people and one of his doctors, which he didn't mention by name, but apparently it is Dr. Dempsey.

"The mental status examination today reveals an alert, cooperative, obese, large, white male who does walk slowly with the crutches in both forearms, who manages to sit in the chair and go through the whole evaluation. After about 2 hours, I suggested he might like to take a break and get up and move around a little bit. At which time he tried to get up and asked if I would get his wife. Mrs. Nelson came in and was trying to help him up and she thought his blood sugar was down. I obtained a bottle of sweetened orange juice for him which he drank and he drank some cool water after and then seemed to straighten out. So he did have a hypoglycemic spell. He was oriented to person, place, time and situation and his speech was goal directed and logical. There's really no evidence of hallucination, delusions or any thought disorder. His affect was somewhat subdued and his thought and feelings seemed to center on anger projected at what he thought people were doing to make his life miserable, namely, one of his doctors and the Workmens' Compensation people. His

intelligence is average or above by his ability to perform serial 71s; repeat six digits forward and reversed; give reasonable and variable answers on similarities and dissimilarities. His general fund of knowledge is intact. His memory is intact for recent and remote events. He uses abstract thought processes and his judgement is normal.

"I then discussed with Mr. and Mrs. Nelson what they thought the real issue was here and he replied, the biggest issue was for him to get transportation and this problem is made worse by his diabetes. If he goes into a coma or falls, he doesn't have time to make arrangements; his wife doesn't have time either. All he is asking for is transportation. He states twice they asked if he found a vehicle that was suitable and they would equip it with hand controls. He would like this because he would not be totally dependent upon his wife. He reports that they told him to go out and find a suitable vehicle that could be modified, get paperwork and prices and turn it in. He did that twice. He said they even asked him about color, type of vehicle and he referred him to his wife because he wanted something to be comfortable. He states I could have gone to a Mercedes or Lexus or a Cadillac but all I wanted was a vehicle that was comfortable; one that would have the handrails, big seats and even the running boards with lights so he could go out at night. It turns out the Lincoln Navigator is the most comfortable, does have the grips, does have lights on the running board and it's the best one he could find.

"I also reviewed information that was forwarded at Claimant's appointment which was Dr. Tracy's deposition and some previous records from Dr. Tracy.

The diagnostic impression of Mr. Joseph Nelson is on

Axis I: Pain Disorder Associated with Both Psychological Factors (307.89) and a General Medical Condition (Chronic Pain Syndrome). Adjustment Disorder with Depressed Mood (309.0).

Axis II: Personality Disorder Not Otherwise Specified with Features of Dependent Personality Traits, Paranoid Personality Traits, and some Histrionic Personality Traits.

Axis III: Post-Operative: 3 Back Surgeries with Fusion.
Diabetes Mellitus
Hypertension
Exogenous Obesity.

"Questions posed to this examiner are as follows:

1) Address the issues of suicidal ideation.

From the history that I have obtained, it was obvious that Claimant at one time had a Major Depression and also Dysthymia which were treated adequately by Dr. Tracy, both medically and with supportive, educational psychotherapy. Claimant is not suicidal and would not do same because of his love and understanding of his family. He is an angry man and does project out some of the blame on the Workmen's Compensation people and one of his doctors but he assured me he would not harm anyone else.

2) Whether Claimant is really incapacitated from a psychiatric point of view.

When we review all the records, we understand that his most recent diagnosis from Dr. Tracy is (309.0) Adjustment Disorder with Depressed Mood which is just what it says; it is an adjustment; he is depressed but he is not incapacitated from a psychiatric point of view. This was also raised earlier as to whether he was incapacitated because of his depression, his chronic pain, his diabetes and the complications with decreasing eye vision and also questions of his being illiterate. The mental status examination shows Claimant is of normal intelligence; he is not an illiterate person and he can read and write. He is not disabled psychiatrically speaking.

3) The issue of Claimant being totally dependent and the reasonableness and the medical necessity of him having special transportation provided for him.

Claimant is at home a lot and is dependent on his wife and others to bathe him, to help him get around and because of his eye problems secondary to his diabetes produces more of a dependency. His blood sugars are not very well stabilized or maintained and he did have a hypoglycemic episode in my office. The picture is further complicated because we have a man who does have these conditions but he also has Exogenous Obesity and probably weighs 350 lbs. It is my understanding that if he could and would lose weight that his diabetes might be better; his back pain might be better; the undiagnosed problems with his equilibrium and his leg control might also be better. So, I would recommend that he go on a concentrated weight loss program. While having transportation would give him a greater sense of independence, this would not cure him and in my opinion, is not medically necessary. Transportation solutions I will leave to the providence of the Court, according to Dr. Maggio.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608,

102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the

resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of entitlement to the medical benefits he seeks and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which did cause the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Mifflеton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock**

Co., 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents' counsel disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The testimony of a physician that no relationship exists between an injury and a claimant's employment may be sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and

the issue must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician who has seen the employee on one occasion. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v.**

Southern Stevedores, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted above, I have already found and concluded, and the Board has affirmed, that Claimant's October 31, 1988 work-related injury has rendered him not only permanently and totally disabled but also has resulted in a most tragic situation where he has been relegated to a wheel chair and crutches virtually his entire waking day. As also noted, the only remaining issue is Claimant's entitlement to certain medical benefits which have been steadfastly resisted by the Carrier until the eve of the hearing on remand, even when confronted with the medical evidence in this closed record, including the testimony of its expert, Dr. Maggio, as extensively summarized above.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish

that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on the same day and requested appropriate medical care and treatment. However, while the Employer did accept the claim, it did not authorize certain medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

As noted, Section 7 of the Act provides as follows:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

A Claimant has proven a **prima facie** case for compensable medical services where a qualified physician indicates treatment is necessary for a work related condition. **Turner vs. Chesapeake & Potomac Tel. Co.**, 16 BRBS 255 (1984). It is also well-settled that the Employer is liable for any and all reasonable and necessary medical expenses to treat conditions which are the

natural and unavoidable result of the work related injury. **Atlantic Marine vs. Bruce**, 661 F. 2d 898 (5th Cir. 1981).

Medical care, includes x-rays, prosthetic devices, and such other medical services and supplies recognized as medically appropriate for the care and treatment of the work related injury. In this regard, **see** 20 C.F.R. Section 702.401.

Modifications to the Claimant's home necessitated by his disability, including ramps, widened doorways, handicapped accessible plumbing fixtures, etc., are covered by Section 7. **Dupree vs. Cape Romain Contractors, Inc.**, 23 BRBS 86 (1989).

A suitably equipped handicap vehicle is properly chargeable to the Employer/Carrier as a reasonable means to provide necessary transportation to the Claimant for medical purposes pursuant to Section 7 of the Act. **Day vs. Ship Shape Maint. Co.**, 16 BRBS 38 (1983). (I have recently awarded a similar handicap-accessible, new van in another matter over which I presided and a copy of that decision has been mailed under separate cover to both counsel for their information and future guidance herein.)

When credible testimony, including testimony of the Claimant's treating physician, establishes that Claimant's psychiathc problems arose during the treatment of the Claimant's work-related bodily injury, the Employer/Carrier is liable for reasonable and necessary psychiatric care under Sqction 7. This includes treatment by a psychiatrist for chronic pain syndrome. **Pietrunti vs. Director, OWCP**, **supra**.

The Claimant's treating physician is entitled to special deference. Thus, where the treating physician recommends a particular course of reasonable treatment and the Claimant requests authorization of that course of reasonable treatment, then the Claimant, and not the Employer or Administrative Law Judge, may choose the treatment option. **Amos v. Director, OWCP, supra; Pietrunti, supra.**

Respondents acknowledge that the courts have consistently emphasized that the Act as a whole must be construed liberally in favor of the Claimant. **Voris v. Eikel**, 346 U.S. 328, 74 S. Ct. 88, 98 L. Ed. 5 (1953); **J.B. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967). Pursuant to Section 7 of the Act, the Employer/Carrier is responsible for providing a claimant with reasonable medical treatment, and numerous cases over the years have held that this obligation includes providing "reasonably necessary medical transportation," that is, transportation to and from medical providers. However, Respondent’s counsel submits that he has been unable to find even a single instance in the jurisprudence in which an Employer has been required to buy a Longshore Act claimant a motor

vehicle as a form of therapy for depression, particularly when, as here, the depression is not the disabling medical condition. (I reject such thesis, as further discussed below.)

Section 7(a)defines compensable medical treatment with respect to transportation as, "reasonable and necessary cost of travel incident hereto ... for the care and treatment of the injury or disease". Reasonable medical transportation provided by employer/carriers has been well established in other circuits as a matter of law. In **Day v. Ship Shape Maintenance Company**, 16 BRBS 38(1983). The Benefits Review Board held that "[e]mployer's purchase of a van is a reasonable means of fulfilling the employer's duty to provide currently necessary transportation under Section 7(a)" for a quadriplegic claimant.

Counsel for the Respondents attempts to distinguish **Day** as a unique factual situation. In **Smith v. Roubin & Janeiro, Inc.**, 21 BRBS 187 (1988), the Board noted that because Day was a quadriplegic, his circumstances warranted the Employer-Carrier's purchase of a new vehicle. The Board held that, due to Day's lack of mobility and the severity of his circumstances, that particular purchase, for him, fell within the meaning of Section 7 of the Act. Unlike Mr. Day's situation, however, the Board held that Smith was able to walk around with a "quad" cane and leg brace and even though Smith needed assistance entering and exiting a vehicle, the purchase of a new vehicle, in order to render the claimant "more independent," was not a reasonable and necessary expense for the employer/carrier to incur.

The Claimant in **Smith** (like Claimant in the instant claim) requested a vehicle in order to render him "more independent." The Board held that the request was unreasonable as a matter of law. Counsel points out that Claimant is ambulatory; he is able to walk with, and sometimes without, the assistance of his bilateral crutches. His request for a luxury sport utility vehicle for the same purpose, **i.e.**, in order to render him "more independent," [TR 95, 10-22] is similarly unreasonable, medically inappropriate according to two of the three physicians who have seen Claimant, and is beyond the community standard of medical care.

Respondents' counsel submits that the mere idea of Claimant's request for a luxury vehicle, such as a Lincoln Navigator, when his medical transportation needs have been adequately provided, flies in the face of logic, reason and the integrity of Section 7 of the Act. The Court is required to consider "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". **Amos v. Director**, 153 F. 3d 1051 (9th Dir. 1998). Claimant's evidence to support requiring the Employer-Carrier to purchase him a luxury Lincoln Navigator has not been more than "mere scintilla," and little

more than an expression of his wishes and those of his wife. Counsel further points out that when the Employer-Carrier was providing a rental van to Claimant to transport him to and from medical providers, he and his wife used it for general transportation, according to their own testimony. It was not until the Employer-Carrier terminated this abuse of Section 7 benefits that the idea of providing a Lincoln Navigator as a form of psychiatric therapy surfaced. The abuse was curbed by providing limousine service to transport Claimant to and from the medical providers, and that service has been sufficient to satisfy the requirements of Section 7. Therefore, counsel for the Respondents submits that this Court should deny Claimant's request for a Lincoln Navigator as a medically-unreasonable and unnecessary expense as a matter of law.

Counsel requests that Dr. Tracy's testimony should be balanced against that of Dr. Maggio and Dr. Dempsey as she has offered no testimony outweighing their opinions. Counsel concedes that this Court may afford greater weight to a treating physician's opinion, **Amos v. Director**, 153 F.3d 1051 (9th Cir. 1998).

I have extensively summarized the evidence on the issue of Claimant’s entitlement to the medical benefits that he seeks herein in order to place this issue in proper perspective for the benefit of the parties and of reviewing authorities.

At the outset I note that I am quite surprised that this issue has persisted for so long and that the Carrier has not met Claimant half-way in an attempt to resolve this matter. However, such did not happen and I shall now resolve the issues presented herein.

I also note that I am in complete agreement with Dr. Tracy, especially as she has been Claimant’s treating psychiatrist since February 10, 1992. (CX 1) Claimant was injured in a serious maritime injury and has been relegated to a wheelchair and crutches, has to rely on others for his most basic personal functions, has lost his personal self-esteem and dignity and would be a virtual recluse but for his understanding wife and family. While Respondents’ counsel states that Claimant was able to ambulate about the courtroom (a thesis I categorically reject), I would cite Dr. Maggio’s description of Claimant’s physical condition where the doctor noted Claimant “ambulate(d) slowly” and “lean(ed) heavily on his crutches” (RX B), and later in the same report, Dr. Maggio reports that Claimant “walk(ed) slowly with the crutches in both forearms.” (**Id.**) Dr. Tracy describes Claimant in similar terms. (CX 1)

Therefore, it is obvious that Claimant needs personal transportation so that he might be restored, as best as

possible, to the **status quo ante** that he enjoyed prior to his injury. Claimant will probably not be able to ambulate as he once did and it is the Carrier's obligation to give him the necessary assistance, within the meaning and intent of Section 7.

The present system utilized by the Carrier of providing a limousine service, after prior booking in advance, to take Claimant **solely** to his medical appointments is simply unwieldy, expensive and inappropriate for the medical emergencies to which Claimant is susceptible, especially as he experienced an attack of hyperglycemia while being interviewed by Dr. Maggio. The present system is very costly and had resulted in costs of over $75,000.00, as of the date of the hearing on March 22, 2000, an amount about which the Carrier's adjuster on this claim was unaware. (TR 150-151) I note in passing that that amount is sufficient to purchase two brand new, fully-equipped, handicapped-accessible Lincoln Navigators.

Accordingly, in view of the foregoing, I find and conclude that a handicapped-accessible van is medically necessary for the Claimant, according to the well-reasoned and well-documented opinions of Dr. Tracy, as such opinions are based upon the totality of Claimant's multiple orthopedic and psychological problems. On the other hand, I reject the opinion of Dr. Maggio that such van is not medically necessary because it will not cure Claimant from a psychiatric viewpoint. That is not the point, in my judgment. The purpose of Section 7 is to restore Claimant to the **status quo ante,** to the extent possible, and I find and conclude that such a van is reasonable, necessary and appropriate. Likewise, Dr. Dempsey's opinion is based solely on Claimant's orthopedic condition and I note that the doctor's opinion on the necessity of a van has wavered, and I am not persuaded as to why he has done so, even solely from an orthopedic standpoint. In her forthright reports and in her categorical testimony before me, Dr. Tracy alone recognizes the medical necessity of a suitable van because of Claimant's multiple medical problems.

Thus, I reiterate that Dr. Tracy's opinions are entitled to greater weight she has been Claimant's treating psychiatrist since February 10, 1992 and as she is in the best position to state an opinion on this issue. In this regard, **see Pietrunti, supra,** and **Amos, supra.**

However, I also find and conclude that a Lincoln Navigator, as the the so-called top-of-the-line SUV, is unreasonable and not permitted by Section 7 of the Act. I realize that Claimant's large body frame may be more comfortable in a Lincoln Navigator but it is my judgment that the Employer and Carrier shall provide to Claimant, as soon as possible, a suitable,

handicapped-accessible van, such as the Plymouth Voyager, a Dodge Caravan or a comparable vehicle, commonly referred to as a "mini-van." Such a van will enable Claimant to go to his myriad medical appointments, whenever needed, and will enable him to retain some of his personal dignity and self-esteem and to not be so dependent on others. I suggest that the parties work together, in a **bona fide** attempt to resolve this issue by agreeing on the type of van, including the necessary accessories to make the van handicapped-accessible. If not, then the U.S. Court of Appeals for the Fifth Circuit should be given the chance to resolve this issue with finality.

With reference to the ongoing psychiatric treatment by Dr. Tracy, while the parties have agreed on an eighteen month interim agreement, effective December 22, 1999 and as that agreement will expire shortly, I agree with Dr. Tracy that Claimant requires ongoing psychiatric counseling, especially as even Dr. Maggio agrees that Dr. Tracy's treatment plan has been beneficial.

Accordingly, Claimant is entitled to an award of continuing psychiatric counseling with Dr. Tracy for so long as such treatment is reasonable, necessary and medically appropriate, even after termination of the eighteen month interim agreement, subject to the provisions of Section 7 of the Act.

Moreover, the Employer and Carrier should also make the appropriate modifications to Claimant's home, as agreed in JX 1, if same have not already been done.

As Claimant was seriously injured on October 31, 1988 and as these outstanding issues have dragged on for such a long time, I urge the parties to work together and amicably resolve these issues as soon as possible so that Claimant can go on with his life with a reasonable amount of personal dignity and self-esteem.

Attorney's Fee

Claimant's attorney, having again successfully prosecuted this matter, is entitled to a fee assessed against the Employer and Carrier ("Respondents"). Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after June 2, 1999, the date of the Board's **ORDER**. Services rendered prior to this date should be submitted to the Board for its consideration. The fee petition shall be filed within thirty (30) days of this decision and Respondents' counsel shall have fourteen days to file a response.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including the medical benefits specifically discussed and awarded herein, subject to the provisions of Section 7 of the Act.

2. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the Board's **ORDER** on June 2, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated: October 11, 2000
Boston, Massachusetts
DWD:dr